

University of Dundee

Brexit, The Repatriation of Competences and the Future of the Union

Page, Alan

Published in:
Juridical Review

Publication date:
2017

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Page, A. (2017). Brexit, The Repatriation of Competences and the Future of the Union. *Juridical Review*, 2017(1), 38-47.

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from Discovery Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain.
- You may freely distribute the URL identifying the publication in the public portal.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Brexit, the repatriation of competences and the future of the Union

Introduction

Constitutional law in Scotland is dominated by uncertainty – uncertainty over the United Kingdom’s future relationship with the European Union, over Scotland’s future relationship with the European Union, and over Scotland’s future relationship with the United Kingdom. The immediate cause of that uncertainty is ‘Brexit’, which the UK Supreme Court said in its recent *Miller* judgment will effect no less fundamental a change in the UK’s constitutional arrangements than that which occurred when the UK joined the European Communities as the European Union then was in 1973.¹ It will also necessitate amendments to the devolution settlement, which has only just been amended by the Scotland Act 2016; quite apart from which it may well prompt a second Scottish independence referendum, within a few short years of the first, which was supposed to have settled the question of Scotland’s constitutional future ‘for a generation’. A further but less immediate cause of constitutional uncertainty, which also has its origins in the UK’s or more accurately the Conservative Party’s troubled relationship with Europe, is the Conservative Government’s manifesto commitment to replace the Human Rights Act 1998 with a British Bill of Rights, which has been put on hold until the UK’s arrangements for leaving the European Union are known.²

Brexit

On 23 June 2016 the United Kingdom voted to leave the European Union by 51.9 per cent to 48.1 percent, on a turnout of 72.2 per cent. Although the European Referendum Act 2015 did not prescribe what should happen in the event of a vote to leave, the result has been treated to all intents and purposes as politically binding. The UK intends therefore to trigger Article 50 of the Lisbon Treaty, notifying the European Council of its intention to withdraw from the EU, by the end of March 2017. Notification will be followed by negotiations over the arrangements for the UK’s withdrawal and its future relationship with the EU. Article 50 sets a two-year time limit on these negotiations, which may be extended but only by the unanimous agreement of the other 27

¹ *Miller and Dos Santos v Secretary of State for Exiting the European Union* [2017] UKSC 5 [78], [81].

² HC Deb 24 January 2017, vol 620, col 153.

member states. The UK will thus cease to be a member of the EU two years after notification, regardless of whether or not agreement has been reached on the arrangements for its withdrawal and its future relationship with the EU, unless the other 27 member states unanimously agree to extend the two-year period.

In a speech at Lancaster House on 17 January 2017, the Prime Minister declared that:

‘Leaving the European will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country. Because we will not have truly left the European Union if we are not in control of our own laws.’³

As the reference to laws made in Edinburgh, Cardiff and Belfast makes clear, ‘taking control of our own laws’⁴ means something very different from what it meant when the UK joined the European Communities in 1973 and the UK Parliament was the only legislature in the United Kingdom.⁵ Viewed from the perspective of Scotland, Wales and Northern Ireland, Brexit has the potential to significantly alter the balance of powers between Westminster and the devolved legislatures. It does so because the majority of powers to be repatriated from Brussels are reserved or excepted in the cases of Scotland and Northern Ireland, and not devolved in the case of Wales, and will accordingly fall to the UK Parliament rather than the devolved legislatures unless the relevant devolution legislation is amended.⁶ It thus raises in a new and acute form the question, which is as old as the Anglo-Scottish Union itself, of the protection of Scottish and the other devolved nations’ interests in relation to matters decided at Westminster, a question to which devolution was conceived at least at least in part as an answer.

³ <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>
The Prime Minister speech formed the basis of a White Paper published 2 weeks later: *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417, 2017). The relevant passage from the White Paper (para 2.1) reads: ‘We will take control of our own statute book and bring an end to the jurisdiction of the Court of Justice of the European Union in the UK.’

⁴ Cm 9417 (n 3) ch 2.

⁵ The Stormont Parliament was suspended in 1972 before being abolished by the Northern Ireland Constitution Act 1973.

⁶ As regards Scotland, see Alan Page, *The implications of EU withdrawal for the devolution settlement* (2016), a paper prepared for the Scottish Parliament’s Culture, Tourism and External Relations Committee. Available at: http://www.parliament.scot/S5_European/General%20Documents/The_implications_of_EU_withdrawal_for_the_devolution_settlement.pdf

The *Miller* case

A question that arose almost immediately after the referendum was whether triggering Article 50 was a matter for the UK government alone in the exercise of its foreign affairs prerogative, which includes the making and unmaking of treaties, or whether it required parliamentary authorisation and, if so, in what form. On 24 January 2017, the Supreme Court, by a majority of 8 to 3, decided that the government could not notify the European Council of the UK's intention to withdraw from the European Union, without first obtaining the approval of Parliament in the form of legislation.⁷ 'We cannot accept that a major change to UK constitutional arrangements can be achieved by a ministers [sic] alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.'⁸

The Supreme Court also decided, unanimously rather than by a majority, that the UK government was not legally obliged to consult the Scottish Parliament, or the other devolved legislatures, or to obtain their agreement before triggering Article 50, despite in Scotland's case the Sewel convention, whereby the UK Parliament will not normally legislate with regard to devolved matters without the Scottish Parliament's consent, having been put on a 'statutory footing' in implementation of the recommendations of the all-party Smith Commission, which was set up immediately after the 2014 independence referendum to recommend changes to the devolution settlement.⁹ In writing the convention into the Scotland Act, the Supreme Court said, the UK Parliament was not seeking to convert it into a rule 'which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement.'¹⁰ While the convention had an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures, the policing of its scope and the manner of its operation were therefore matters for the political rather than the judicial process.¹¹

⁷ *Miller and Dos Santos* (n 1).

⁸ *Miller and Dos Santos* (n 1) [82].

⁹ *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (2014) para 22; Scotland Act 2016, s 2, inserting new s 28(8) in the Scotland Act 1998. The convention has also been put on a statutory footing by the Wales Act 2017 s 2.

¹⁰ *Miller and Dos Santos* (n 1) [148].

¹¹ *Miller and Dos Santos* (n 1) [151].

Some comment has suggested that the Sewel convention has been weakened as a result of the Supreme Court's judgment. This is to misunderstand the significance of the convention, which remains no less politically binding than before. The possibility of going to court has been removed, which governments are not in the habit of doing save in exceptional circumstances such as those of Brexit, but the leverage which the convention gives the Scottish government through the Scottish Parliament has not been diminished. The question of the Scottish Parliament's consent to the legislative consequences of EU withdrawal has thus been only delayed, not settled, by the Supreme Court's decision.

The summary manner in which the devolved administrations' arguments were dismissed will nevertheless have come as a disappointment to those seeking judicial support for a more plural interpretation of the UK constitution than the essentially unitary interpretation which held sway when the UK joined the EU more than 40 years ago.

The Supreme Court's decision on the principal question before it did not provoke the same outrage as the earlier High Court decision (against which the government had appealed), which had seen the judges involved pilloried as 'enemies of the people',¹² the government having made it clear that it would introduce authorising legislation if its appeal was unsuccessful and much of the parliamentary opposition to Brexit by then having fallen into line behind the 'democratic will of the people'.¹³

On 7 February, two weeks and a day after the Supreme Court's judgment, the European Union (Notification of Withdrawal) Bill, authorising the Prime Minister to notify the European Council of the UK's intention to withdraw from the European Union, completed its Commons stages. Barring difficulties in the House of Lords, the Prime Minister will be authorised to trigger Article 50 by the end of March as originally planned.

¹² *Daily Mail*, 4 November 2016.

¹³ Cm 9417 (n 3) 5.

The Great Repeal Bill

At the Conservative Party conference on 2 October 2016 the Prime Minister announced plans to introduce a ‘Great Repeal’ Bill in the next Queen’s Speech, which would, among other things, repeal the European Communities Act 1972, which gives effect to EU law in the United Kingdom. Simply repealing the European Communities Act without more, however, would result in legal chaos. In the interests of legal certainty, therefore, the ‘acquis communautaire’ – the body of existing EU law – would, ‘wherever practical’, be converted into domestic law. ‘This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before.’¹⁴ EU law having been ‘preserved’, it will then fall to the UK Parliament and, where appropriate, the devolved legislatures to decide ‘which elements of that law to keep, amend or repeal once we have left the EU’.¹⁵

After more than forty years of membership, EU law is woven into the fabric of UK law to such an extent that it is impossible to envisage the relationship between them being unpicked without extensive recourse to subordinate legislation. The Great Repeal Bill will, therefore, ‘enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly once we have left the EU, so that our legal system continues to function correctly outside the EU.’¹⁶

Under the Scotland Act the power to make such legislation will be exercisable by the Scottish Ministers in areas of devolved competence.¹⁷ A key question that will arise is whether it should be exercisable by UK ministers as well, as is currently the case with the transposition of EU obligations in the devolved areas.¹⁸ An advantage of the power being so exercisable is that would allow the Scottish Minister the option of relying on UK subordinate legislation in amending or repealing EU law in the devolved areas.

¹⁴ Lancaster House Speech (n 3). ‘This means that, wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before’: Cm 9417 (n 3) para 1.1.

¹⁵ Cm 9417(n 3) p 10.

¹⁶ Cm 9417(n 3) p 10.

¹⁷ Scotland Act 1998 (SA 1998) s 53(1).

¹⁸ SA 1998, s 57(1).

A further question that will then arise is that of Scottish parliamentary control over such legislation. At the moment there is no requirement of the Scottish Parliament's consent to UK subordinate legislation transposing EU obligations in the devolved areas; nor is the Parliament routinely informed of such legislation.¹⁹ The Scottish Parliament could thus find itself with no oversight over the amendment or repeal of EU derived law in the devolved areas, unless steps are taken to give it a role in the process. One way in which that might be done would be by extending the Sewel convention to secondary legislation. The alternative, and more appropriate course, which would leave the Sewel convention unaltered, would be to make the exercise of subordinate law making powers subject to parliamentary procedures in both the UK and Scottish Parliaments, models for which are to be found in Schedule 7 to the Scotland Act 1998.

The Scottish Parliament's consent

As mentioned, the question of the Scottish Parliament's consent to the consequences of EU withdrawal has only been delayed, not settled, by the Supreme Court's judgment in the *Miller* case. Whether the Scottish Parliament's consent is required to the Great Repeal Bill will depend on the terms in which the bill is drafted, but the question of its consent will inevitably arise in the event of adjustments being sought to the boundary between reserved and devolved matters, or the devolution settlement being amended to relieve the Scottish Parliament and the members of the Scottish Government of the obligation to act compatibly with EU law (a possible counter-argument as regards the latter is that it would be a natural consequence of withdrawing from the EU). The Secretary of State for Scotland has been reported as saying: 'given that the Great Repeal Bill will impact on the responsibilities of the Scottish Parliament and the responsibilities of Scottish Ministers then it's fair to anticipate that it would be the subject of a legislative consent process'.²⁰

Scotland's Place in Europe

Had Scotland in common with England and Wales voted to leave the EU, the referendum result would have had no implications for Scotland's position within the UK. Scotland, together with Northern Ireland, however, voted to remain (in Scotland's case by 62 per cent to 38 per cent, on

¹⁹ Alan Page, *Constitutional Law of Scotland* (W Green, Thomson Reuters 2015) 20.18.

²⁰ *The Times* 27 January 2017.

a turnout of 67.2 per cent), raising the possibility of a second independence referendum, the SNP government having been elected on a manifesto which said that the Scottish Parliament ‘should have the right to hold another referendum ... if there is a significant and material change in the circumstances that prevailed in 2214, such as Scotland being taken out of the EU against our will.’

In *Scotland’s Place in Europe*, published in December 2016, the Scottish government set out its response to the referendum result. Its preference was for the UK as a whole to remain in the EU ‘single market’²¹, failing which Scotland should remain. Should that not be possible there should be a second independence referendum. ‘If the real and substantial risks that Brexit poses to Scotland’s interests cannot be mitigated within the UK, the option of choosing a better future through independence should be open to the Scottish people.’²²

In her Lancaster House speech, the Prime Minister made it clear that the UK would not seek membership of the single market: ‘We do not seek membership of the Single Market. Instead we seek the greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement.’²³ The UK remaining in the single market having been ruled out, attention switches to the possibility of Scotland remaining. While a ‘differentiated relationship’ between Scotland and the EU has not been ruled out –discussion at the UK level of government officially continues - it is widely regarded as unlikely, making a second referendum seemingly inevitable.

In preparation for a second referendum the Scottish Government has consulted in a draft Scottish Independence Referendum Bill.²⁴ As with the 2014 referendum, however, a second referendum would almost certainly require the agreement of Westminster in the form of a section 30 order under the Scotland Act 1998, granting the Scottish Parliament the power to legislate for a referendum. There are a number of barriers, political as well as legal, to be overcome therefore before a second referendum can be held.

²¹ Defined by Article 26 TFEU as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.

²² Scottish Government, *Scotland’s Place in Europe* (December 2016), First Minister’s Foreword.

²³ Lancaster House Speech (n 3); in the White Paper’s words (p 35): ‘We will not be seeking membership of the Single Market, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement’.

The devolution settlement

In *Scotland's Place in Europe*, the Scottish Government argued that, regardless of whether or not the Brexit negotiations yielded a 'differentiated agreement' for Scotland, Scotland's interests within the UK demanded 'a fundamental review of the devolution settlement'.²⁵ The need for that review arose 'as a result of the removal of the protections provided by EU law for the devolved institutions and the rights of citizens'.²⁶ It was also required in order 'to avoid excessive concentration of power at Westminster'.²⁷

The paper identified three categories of powers for consideration:

Repatriated powers within devolved competence

In the first category were powers to be 'repatriated' from Brussels that were already within the Scottish Parliament's competence, for example in agriculture, fisheries and the environment, which the paper insisted must remain devolved; there must be no question of re-reserving or qualifying powers already devolved. 'Exit from the EU must not result in centralisation of control at Westminster'.²⁸ Where there might be a need to devise a cross-border framework to replace that provided by EU law, for example in relation to animal health, that should be 'a matter for negotiation and agreement between the governments concerned, not for imposition from Westminster'.²⁹

Repatriated powers within reserved competence

In the second category were repatriated powers within the UK Parliament's competence, in areas such as employment law, health and safety and consumer protection, which should be devolved to enable the Scottish Parliament to protect individual rights. Devolution of additional

²⁵ *Scotland's Place in Europe* (n 22) para 4.

²⁶ *Scotland's Place in Europe* (n 22) para 4.

²⁷ *Scotland's Place in Europe* (n 22) para 172.

²⁸ *Scotland's Place in Europe* (n 22) para 176a.

²⁹ *Scotland's Place in Europe* (n 22) para 179.

responsibilities to the Scottish Parliament would enable it ‘to reflect Scottish priorities in safeguarding and enhancing the rights of people in Scotland.’³⁰

Additional powers to protect Scotland’s interests

The final category comprised additional powers to protect Scotland’s interests in a UK that was no longer part of the EU. ‘Leaving the EU requires a rethinking of the nature of the UK as a state to ensure an appropriate balance of powers and responsibilities to replace that previously shaped with reference to EU law and institutions, and to avoid a further concentration of power at Westminster.’³¹ Among the powers included in this category were powers over immigration, powers to conclude international agreements in areas of Scottish Parliament responsibility, and a range of powers that would be required for the Scottish government to meet the regulatory and administrative requirements of continued single market membership.³²

Without directly addressing the Scottish government’s proposals, the UK government’s subsequent White Paper said that the repatriation of powers provided an opportunity to determine the level of government best placed to make new laws and policies in areas which were currently the subject of EU competence such as agriculture and the environment, ‘ensuring power sits closer to the people of the UK than ever before.’³³ The Prime Minister, in her Lancaster House speech, had confirmed that ‘no decisions currently taken by the devolved administrations [would] be removed from them’ (‘I should equally be clear that no decisions currently taken by the devolved administrations will be removed from them’) and the opportunity of bringing decision making back to the UK would be used be ‘to ensure that more decisions [were] devolved.’³⁴

As the Prime Minister, also made clear in her Lancaster House speech, however, there were limits in the UK government’s view to how far that process might be taken:

‘I look forward to working with the administrations in Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the United Kingdom. Part of that

³⁰ *Scotland’s Place in Europe* (n 22) para 182.

³¹ *Scotland’s Place in Europe* (n 22) para 184.

³² *Scotland’s Place in Europe* (n 22) First Minister’s Foreword; para 186 sets out a long list of areas to be considered for further devolution.

³³ Cm 9417(n 3) para 3.5.

³⁴ Cm 9417(n 3) para 3.5.

will mean working very carefully to ensure that – as powers are repatriated from Brussels back to Britain – the right powers are returned to Westminster, and the right powers are passed to the devolved administrations of Scotland, Wales and Northern Ireland. As we do so, our guiding principle must be to ensure that – as we leave the European Union – no new barriers to living and doing business within our own Union are created. That means maintaining the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world, and protecting the common resources of our islands.’³⁵

Whether this presages an attempt by the UK government to resume legislative competence over devolved areas such as agriculture and the environment remains to be seen. A lot may turn on what is understood by ‘decisions currently taken’ by the devolved administrations.³⁶ As the White Paper pointed out, the role of the devolved administrations in areas such as agriculture is essentially one of implementing decisions taken at the EU level.³⁷ Devolution may be understood therefore as involving something less than ‘full fat’ competence.

Leaving aside the possibility if not the probability of a second independence referendum, the scene is thus set for no doubt lengthy, complex and difficult negotiations between the UK and Scottish governments over the consequences of EU withdrawal for the Scottish Parliament’s powers - the third such set of negotiations in recent years. Whether a deal can be struck to which the Scottish Parliament’s consent can be secured remains to be seen.

³⁵ Lancaster House Speech (n 3); Cm 9417(n 3) para 3.6: ‘So our guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created. We will maintain the necessary common standards and frameworks for our own domestic market ...’

³⁶ Cm 9417(n 3) para 3.5.

³⁷ Cm 9417(n 3) para 3.4.